



Modified PTO/SB/33 (10-05)

PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number	
Mail Stop AF Commissioner for Patents P.O. Box 1450 Alexandria, VA 22313-1450		Application Number	Filed
		10/031,599	May 22, 2002
		First Named Inventor	
		Ludovic PETIT, et al.	
		Art Unit	Examiner
		3732	Stephanie L. WILLATT
WASHINGTON OFFICE <b>23373</b> CUSTOMER NUMBER			
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal.</p> <p>The review is requested for the reasons(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.</p> <p><input checked="" type="checkbox"/> I am an attorney or agent of record. Registration number <u>43,078</u></p> <p><u>Udanta S Dye / 43,355</u> Signature</p> <p><u>J Raja Saliba</u> Typed or printed name</p> <p><u>(202) 293-7060</u> Telephone number</p> <p><u>May 23, 2006</u> Date</p>			



**PATENT APPLICATION**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re application of  
Ludovic PETIT, et al.

Docket No: Q68159

Appln. No.: 10/031,599

Group Art Unit: 3732

Confirmation No.: 6533

Examiner: Stephanie L. WILLATT

Filed: May 22, 2002

For: A FLUID DISPENSER DEVICE HAVING A CLOSURE SYSTEM

**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

**MAIL STOP AF - PATENTS**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

Pursuant to the new Pre-Appeal Brief Conference Pilot Program, and further to the Examiner's Final Office Action dated December 23, 2005, Applicant files this Pre-Appeal Brief Request for Review.

Claims 1-8 and 10-25 are all the claims pending in the application.

Claims 24 and 25 are rejected under 35 U.S.C. § 112, first paragraph, for allegedly reciting subject matter that was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventors, at the time the application was filed, had possession of the claimed invention. *See* Office Action dated December 23, 2005 ("Final Office Action") at page 2.

Claims 1-8 and 10-23 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Lina et al. (US 5,190,192) in view of Brakarz et al. (US 5,323,933) and Schneider (US 4,949,876), as evidenced by Dobbs et al. (US 5,785,208).

As detailed in Applicant's last Response of March 23 ("Response"), as well as Applicant's prior responses to previous office actions, the focus of the disagreement between the Applicant and the Examiner thus far relates to the Examiner's failure to properly consider Applicant's disclosure from the perspective of one of ordinary skill in the art and the Examiner's improper broad interpretation of the language "dead stroke" recited in the claims. Each of these issues is taken up below.

***1. Claims 24 And 25 Rejected Under 35 U.S.C. § 112, First Paragraph***

In rejecting claims 24 and 25 under 35 U.S.C. § 112, first paragraph, the Examiner argues that "[t]he original disclosure does not give a certain definition to 'dead stroke,'" and that "there is no indication in the original disclosure that during the 'initial dead stroke,' there is no pressure increase in the dispensing member and no fluid/product expulsion from the dispensing member." See Final Office Action at page 2.

As argued at page 3 of Applicant's Response, it would have been abundantly clear to one skilled in the art, having read Applicant's disclosure as originally filed, that the inventors possessed all the features recited in claims 24 and 25. In making her rejection, the Examiner appears to have applied an improper standard that requires something akin to a verbatim repetition of the claim language in the specification. However, such specificity is not required. "The analysis of whether the specification complies with the written description requirement calls for the examiner to compare the scope of the claim with the scope of the description to determine whether applicant has demonstrated possession of the claimed invention. Such a review is conducted *from the standpoint of one of skill in the art* at the time the application was filed (see, e.g., Wang Labs. v. Toshiba Corp., 993 F.2d 858, 865, 26 USPQ2d 1767, 1774 (Fed. Cir. 1993)) and should include a determination of the field of the invention and the level of skill

and knowledge in the art.” Manual of Patent Examining Procedure (“MPEP”), Section 2163 (emphasis added).

From Applicant’s disclosure, it would be clear to one skilled in the art that during the dead stroke there is no compressibility of fluid and there is no fluid expulsion until after the dead stroke *during regular operation of the pump*. Applicant’s specification provides explicit support for this feature. For example, Applicant’s specification discloses in one embodiment that “the pump 20 preferably has an initial dead stroke *so that fluid expulsion starts only after said dead stroke, when the dispensing orifice 31 is situated facing the opening 42*” (see specification at page 5 (emphasis added)). One skilled in the art would understand from Applicant’s disclosure that the purpose of the dead stroke is to prevent, *in each instance that the pump is actuated*, the compression of fluid and the consequential expulsion of the fluid while the dispensing orifice 31 faces the closure element. Moreover, in the last paragraph of page 5, the specification explains the problems of oxidation of the fluid. Accordingly, one skilled in the art would understand that the Applicant was referring to a stroke in which nothing happens during each actuation of the pump and not the initial priming of the pump. Moreover, the literal interpretation of the term “*dead* stroke” indicates that nothing happens during the stroke. On the other hand, the Examiner’s interpretation of “dead stroke” as including the priming step is simply inconsistent with Applicant’s disclosure.

Therefore, based on a fair and proper reading of Applicant’s disclosure as a whole from the perspective of one of ordinary skill in the art, it is indisputable that Applicant possessed the features recited in claims 24 and 25, requiring withdrawal of the rejection under 25 U.S.C. §112, first paragraph.

**2. Claims 1-8 And 10-23 Rejected Under 35 U.S.C. § 103(a) In View Of Lina et al., Brakarz et al., Schneider And Dobbs et al.**

Aside from having to rely on no fewer than four references in order to reject claims 1-8 and 10-23, and as explained in Applicant's Response at page 5, the grounds of rejection are flawed because they adopt a meaning for the recited "dead stroke" in claim 1 that is entirely inconsistent with a proper reading of this term when read in light of the specification. While the specification does not limit the scope of the claims, the claims should not be interpreted in a vacuum. *Slimfold Mfg. Co. v. Kinkead Industries, Inc.*, 810 F.2d 1113 (Fed. Cir. 1987). "[T]he person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, *but in the context of the entire patent, including the specification.*" *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) (emphasis added). During examination in the USPTO, "claims . . . are to be given their broadest reasonable interpretation *consistent with the specification*, and . . . claim language should be read *in light of the specification as it would be interpreted by one of ordinary skill in the art.*" *In re Bond*, 910 F.2d 831, 833 (Fed. Cir. 1990) (emphasis added).

The grounds of rejection are based on an improper definition of dead stroke as including the initial stroke for priming the pump. Moreover, the grounds of rejection ignore the explicit language in claim 15, for example, that requires the dead stroke for "*each time* the dispenser head moves from the rest position to the dispensing position during operation of the device." An important difference, therefore, is that at the beginning of each actuating stroke, there is provided the recited dead stroke. This functional feature is not present in ordinary precompression pumps and, therefore, necessarily imparts a structural limitation that is simply not found in the pump disclosed in Lina et al.

As one skilled in the art knows, the actuating stroke of a precompression pump is determined such that at the beginning, the pump chamber is isolated (closing of inlet valve). Pressure is then increased on the piston up to the opening of the outlet valve, providing expulsion with pressure. A structural difference in the pump as claimed is that the actuating stroke is made slightly longer (for the same dose), such that, at the beginning, *nothing happens*. Only after the completion of the dead stroke does the precompression pump starts to operate.

The Examiner argues that the priming phase in the pump disclosed in Lina et al. includes a dead stroke. That is not correct, because during the priming phase the pump chamber also becomes isolated at the very beginning of the actuating stroke (closing of the inlet valve). There is then an immediate pressure increase inside the pump chamber. A stroke is possible only because air is compressible. However, this is not a dead stroke, where nothing happens. In any case, after priming, when the air is replaced by liquid, the pump disclosed in Lina et al. does not provide any dead stroke before actuation of the precompression pump, even under the Examiner's interpretation of this language.

Reversal of the rejections is respectfully requested.

Respectfully submitted,

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